Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

JEFFREY ARNOLD HIGGS, *Petitioner,*

v.

PEOPLE OF THE STATE OF COLORADO, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the trial court violate the Defendant's federal constitutional rights of a fair trial and due process as guaranteed Defendant under U.S. Const. Amend. VI and XIV by refusing to include Defendant's tendered jury instruction?

PARTIES TO THE PROCEEDING

The parties to these proceedings are as follows:

1. Petitioner-Appellant, Jeffrey Arnold Higgs

2. Respondents-Appellees, People of the State of Colorado

3. Honorable Randall J. Davis, Broomfield County Court

4. Honorable Donald W. Marshall, Jr., 17th Judicial District Court

5. Colorado Supreme Court

TABLE OF CONTENTS

1.	Caption	
2.	Questions Presented for Review	P. i
3.	List of Parties to the Proceeding	P.ii
4.	Table of Contents	P. iii
5.	Table of Cited Authorities	P. iv-vi
6.	Citations of Official Reports, Unofficial Reports, Opinions and Orders	P. 1
7.	Jurisdiction	P. 2
8.	Constitutional Provisions Involved in the Case	P. 3
9.	Statement of the Case	P. 4-5
10.	Argument	P. 6-16

TABLE OF CITED AUTHORITIES

	Page
1. *Behr v. McCoy,* 138 Colo. 137, 330 P.2d 535 (1958)	7
2. *Carter v. Kentucky,* 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981)	8
3. *Cokley v. People,* 168 Colo. 52, 449 P.2d 824 (1969)	6, 7
4. *Denver Tramway Co. v. Doyle*, 63 Colo. 500, 167 P.777 (1917)	7
5. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 491 (1968)	8
6. *Jones v. U.S.*, 361 F.2d 537 (D.C. Cir. 1965)	14
7. *Kentucky v. Wharton*, 44 U.S. 887, 100 S.Ct. 186, 62 L. Ed. 2d 121 (1979)	9
8. *Missouri v. Todd*, 537 S.W.2d 865 (1976)	16
9. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L. Ed. 2d 492 (1992)	8
10. *Ortega v. People*, 161 Colo. 463, 423 P.2d 21 (1967)	6
11. *People v. Hennion*, 923 P.2d 256 (Colo. App. 1996)	7

12. *People v. Nunez*, 841 P.2d 261 (Colo. 1992) 7

13. *People v. Thiery*, 780 P.2d 8 (Colo. App. 1989) 14

14. *Salley v. U.S.*, 353 F.2D 897 (D.C. Cir. 1965) 14, 19

15. *U.S. v. Anderson*, 739 F.2d 1254 (7 Cir. 1984) 14

16. *U.S. v. Barber*, 442 F.2d 517 (3 Cir. 1971) 9, 10, 11. 16

17. *U.S. v. Dodge*, 538 F.2d 770 (8 Cir. 1976) 15

18. *U.S. v. Evans*, 484 F.2d 1178 (2 Cir. 1973) 15

19. *U.S. v. Hodges*, 515 F.2d 650 (7 Cir. 1975) 11, 12, 14

20. *U.S. v. Holley*, 502 F.2d 273 (4 Cir. 1974) 14

21. *U.S. v. Jackson*, 347 F.3d 598 (6 Cir. 2003) 15, 16

22. *U.S. v. Martinez*, 763 F.2d 1297 (11 Cir. 1985) 14

23. *U.S. v. Masterson*, 529 F.2d 30 (9 Cir. 1976) 15

24.	*U.S. v. McGuire*, 200 F.3d 668 (10 Cir. 1999)	15
25.	*U.S. v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)	10, 11, 13, 14
26.	*U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed. 2d 1149 (1967)	9
27.	*U.S. v. Wilford*, 493 F.2d 730 (3 Cir. 1974)	14
28.	U.S. Const. Amend. VI	i, 2, 3, 8, 13
29.	U.S. Const. Amend. XIV	i, 2, 3, 8, 13
30.	Tit. 28 U.S.C. §§ 2101, 2104, 2106	2
31.	Supreme Court Rule 10	2, 12
32.	Supreme Court Rule 13	2
33.	C.R.S.§ 42-4-1301	4

CITATIONS OF OFFICIAL REPORTS, UNOFFICIAL REPORTS, OPINIONS AND ORDERS

1. Order of the Colorado Supreme Court dated April 19, 2004, denying Petitioner-Appellant's Petition for Writ of Certiorari is attached as Appendix A.

2. Order of the Honorable Donald W. Marshall, Jr., December 5, 2003, affirming the conviction of Defendant-Appellant is attached as Appendix B.

3. Order denying Defendant's Motion to Set Aside Jury Verdict or in the Alternative Motion for New Trial, Honorable Randall L. Davis, April 7, 2003 is attached as Appendix C.

4. March 5, 2003 Order of the Honorable Randall J. Davis and the judgment of conviction of that same date is attached as Appendix D.

JURISDICTION

Jurisdiction is conferred on this Court as federal constitutional questions involving U.S. Const. Amend. VI and XIV are presented. Review is permitted under Tit. 28 U.S.C. §§ 2101, 2104, and 2106 and Supreme Court Rules 10 and 13. Petitioner seeks review of the Colorado Supreme Court Order denying Petition for Writ of Certiorari entered April 19, 2004, which Petition sought review of the December 5, 2003 Order of the 17th Judicial District Court of Colorado denying appeal of the March 5, 2003 Sentencing Order and conviction and Order on Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial of the trial court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

UNITED STATES CONSTITUTION

ARTICLE VI

Rights of accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE XIV

§1. Citizenship defined - privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

This is an appeal of the conviction of the Petitioner in the Broomfield County Court of Driving Under the Influence of Alcohol, C.R.S. § 42-4-1301, as amended, after jury trial, and orders entered in that case by the trial court, the subsequent appeal of the district court for the 17th Judicial District affirming the conviction of the Petitioner and affirming the orders of the trial court and an appeal of the Colorado Supreme Court which denied Petitioner's Petition for Writ of Certiorari. Petitioner was charged with driving under the influence and failure to drive in a single lane, both pursuant to a *Summons and Complaint* issued by the Broomfield Police on July 17, 2002.

The case was tried in the County Court of Broomfield before The Honorable Randall J. Davis to a jury of six on January 6, 2003. The Petitioner was acquitted of the charge of failure to drive in a single lane but convicted of driving under the influence of alcohol. The date of entry of conviction was the date of sentencing, March 5, 2003.

Petitioner timely filed his *Notice of Appeal* with the district court after obtaining an extension of time by proper and timely motion for extension of time to file the *Notice of Appeal.*

The sentence imposed on the Petitioner was as follows: thirty days in jail; a fine, costs and statutory surcharges in the total amount of $1,549.00; sixty hours of useful community service; and compliance with the recommendations of the Probation Department, including completion of a Track D Education and Therapy Program, and engagement in monitored sobriety. Post-trial motions for stay of execution of the sentence have all been granted by the trial court and Petitioner's

sentence remains stayed throughout the pendency of this appeal.

After trial, Higgs appealed his conviction to the state district court. The Honorable Donald W. Marshall, Jr. presided over the appeal and affirmed Higgs's conviction. Higgs then filed a Petition for Writ of Certiorari to the Colorado Supreme Court. The Colorado Supreme Court denied Higgs's Petition on April 19, 2004.

Higgs raised the issues of identification and his proposed jury instruction, which are the combined subject of this Petition, at trial (Vol. I, T.T. 6, 2 -10; T.T. 20, 9-14; T.T. 163, 11 - 19, 1; T.T. 238, 16 - 18; Vol. II, T.T. 123, 11 -18); in his Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial (Exhibit 1 to Petition for Writ of Certiorari to the Colorado Supreme Court); in his Notice of Appeal dated April 1, 2003; Higgs's Opening Brief in support of his appeal to the state district court, Section C, P.P. 15-18; Higgs's Reply Brief, Sections B and C, P.P. 3-7; the Order of the Colorado district court, pages 1, 3 and 4, dated December 5, 2003 (Exhibit 2 to Petition for Writ of Certiorari to the Colorado Supreme Court); and in his Petition for Writ of Certiorari to the Colorado Supreme Court., Advisory Listing of Issues Presented for Review, pages 1 and 2, and Section III, pages 7 - 9.

ARGUMENT

Higgs presented the following pertinent argument in his Petition for Writ of Certiorari to the Colorado Supreme Court concerning the federal constitutional issues addressed to this Court in this Petition:

I. The Trial Court erred when it rejected Petitioner's tendered Jury Instruction on identification, and the District Court erred in affirming this ruling.

As a matter of law, the trial court erred when it refused to submit Petitioner's tendered Jury Instruction on identification to the jury. At trial, counsel for Petitioner tendered a proposed jury instruction which read,

> Identification of the defendant as driving at the time and date of the alleged offense is an essential element to be proved beyond a reasonable doubt by the People. If you find that the identification evidence in this case does not inculpate defendant as the driver of the defendant's vehicle beyond a reasonable doubt, then your verdict must be not guilty.

This instruction was a paraphrase of the language in *Cokley v. People*, *citing Ortega v. People*.[1] Although the trial court conceded the Petitioner's tendered jury instruction was a correct statement of the law, it refused to include this tendered jury instruction. This refusal by the trial court caused undue prejudice to Petitioner.

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[1] *Cokley v. People*, 168 Colo. 52, 449 P.2d 824 (1969), *citing Ortega v. People*, 161 Colo. 463, 423 P.2d 21.

Importantly, the proposed identification jury instruction was a correct statement of the law as iterated in *Cokley*. The proposed instruction was also concise and clear and not redundant guidance for the jury, instructing that identification of Petitioner as the driver of the Higgs's vehicle was the essential predicate to any further deliberation on the guilt or innocence of Petitioner regarding the charged offenses.

An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory.[2] Colorado has never held that the jury instructions setting forth the elements of the offense and the burden of proof, standing alone, can encompass, embody, or take the place of a defendant's theory of the case.[3] In *Denver Tramway* this Court said,

> There is no question concerning the defendant's right to have the jury properly instructed in a concrete manner upon its theory of the case. . . The defendant is entitled to such instructions.. . unless the court can see that no prejudicial error resulted from such refusal.[4]

Petitioner's instruction on identification did not simply restate what was already encompassed in the instructions on the elements of the specific charges, but it was instead absolutely necessary to instruct the jury in a concrete manner on Petitioner's theory of the case, i.e., that he could not be

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[2] *People v. Hennion*, 923 P.2d 256 (Colo. App. 1996).

[3] *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

[4] *Denver Tramway Co. v. Doyle*, 63 Colo. 500, 167 P.777 (1917), *quoted in Behr v. McCoy*, 138 Colo. 137, 330 P.2d 535 (1958).

identified beyond a reasonable doubt as the driver of his vehicle. The failure of the trial court to allow the tendered instruction was a violation of Petitioner's right to a fair trial, which again is a matter of statewide concern as it affects a Constitutional right of Petitioner and all other similarly situated persons defending against criminal charges. (*See,* Petition for Writ of Certiorari to the Colorado Supreme Court, Section III.)

It is the above argument Higgs now wishes to make constitutionally more explicit in urging that this Court grant his Amended Petition for Writ of Certiorari and to consider his appeal on its merits.

Higgs is entitled to the constitutionally mandated rights of a fair, speedy, and public trial and both procedural and substantive due process through U.S. Const. Amend. VI and XIV. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L. Ed. 491 (1968); *Morgan v. Illinois,* 504 U. S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). In discussing the need for a specific jury instruction as to a defendant's privilege against self-incrimination, another equally important constitutional right in criminal prosecutions, this Court appropriately stated that "[a] trial judge has a powerful tool at his disposal to protect the constitutional privilege, the jury instruction, and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment..." *Carter v. Kentucky,* 450 U.S. 288, 303 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981). The same principle enunciated in *Carter* must apply to an instruction on identification when, as here, identification is the sole issue, there is no witness at trial who can positively identify the defendant as the alleged perpetrator of the crime, and there is little or no other evidence of the crime as to the defendant on trial. Granted, it is not always error for a trial court to refuse to give a limiting instruction, which may be requested by a defendant in circumstances, for example, where other

evidence of the defendant's guilt is overwhelming and there is credible evidence of a defendant's identification. *Kentucky v. Wharton,* 100 S. Ct. 186 (1979). However, in the case on Petition, the evidence of identification and all other evidence linking Higgs as the driver of his vehicle is nearly non-existent. The case on Petition is a perfect example of the hazards warned against by this Court when Justice Brennan wrote in *United States v. Wade,* 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L. Ed. 2d 1149 (1967) the following:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontroverted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent, not due to the brutalities of ancient criminal procedure.'

In *United States v. Barber,* 442 F.2d 517 (3 Cir. 1971), the Court of Appeals reviewed the convictions of seven defendants. Four of the convictions were upheld, but three were overturned and those three cases were sent back to the lower court. The *Barber* court spent considerable time analyzing the necessity of specific instructions on key constitutional issues, such as, identification, especially in states, (e.g., now also including Colorado) which employ pattern jury instructions. In *Barber,* the court recognized "a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification." *Id* at 528. The *Barber* Court of Appeals went

on to clarify and distinguish the test for a more particular identification instruction in stating:

> In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.
> *Id* at 528.

Barber, like some other courts, recognized the case of *United States v. Telfaire,* 469 F.2d 552 (D.C.Cir. 1972) as the

benchmark for identification jury instruction guidance. *Barber* and *United States v. Hodges,* 515 F.2d. 650 (7 Cir. 1975) both recognize that identification jury instructions are discretionary with the trial court, but only to a point. The *Hodges* court emphasized that "in cases where identification is a key issue, [trial courts should] include an identification instruction which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." *Id* at 652, citing *Telfaire* as additional authority. The *Hodges* court emphasized:

> that neither the summation of counsel at the close of the evidence, however prolonged or explicit, nor cross-examination as to the matter of identification by defense counsel adequately protects a defendant against the dangers of misidentification which are inherent in eye witness testimony... In cases such as the present, where the issue of identification is paramount, we define proper instructions to include an identification instruction, when it is tendered to the court, in addition to accurate instructions as to burden of proof and the credibility of witnesses. As the District of Columbia Circuit stated in Salley v. United States, 122 U.S. App.D.C. 359, 353 F.2d 897, 899 (1965): It is the obligation of the trial judge 'to instruct the jury that if there was a reasonable doubt as to the identification of the defendant as the person who (committed the crime), then the jury should acquit.'
> *Id* at 654.

At Higgs's trial, the prosecution, defense and trial court all recognized that the sole issue to be decided was

identification. (See, Vol. I T.T. 6, 2-10; 20, 9-14; 165, 17-21) The state district court also agreed in its opinion that identification was the sole issue. (See P.1, District Court Order) A review of the trial transcript reveals that there was only one witness who purportedly could make some identification, Mr. White, but even he could not positively identify Higgs as the driver of the vehicle in question, not either at the time of the alleged offense, before or during trial, not ever. The jury instruction tendered by Higgs, but rejected by the trial court, would have properly focused the jury on the sole issue at trial, which was of constitutional magnitude. Neither the pattern jury instruction of credibility of witnesses, the elements of the offense instruction, nor the combination of any other instructions that actually went to the jury during Higgs's trial, provided the guidance the jury needed nor the constitutional protection to which Higgs was entitled. *(See,* Jury Instruction numbers 5 and 9.) By not including Higgs's proposed instruction, Higgs's theory of his case was precluded and the burden of persuasion was impermissibly shifted from the People to Higgs. As recognized in *Hodges,* arguments of Higgs's counsel and cross-examination of the identification witness were inadequate substitutes for the jury instruction tendered by Higgs, but rejected by the trial court. The Higgs trial court had an obligation to submit the jury instruction offered by Higgs on the critical identification element as a part of Higgs's theory of his case, especially in light of the dearth of identification evidence, the lack of any positive identification at any time by the sole witness on that issue, and since the trial court acknowledged the instruction tendered by Higgs was a correct statement of the law.

One standard for appellate review by this Court is if there is disagreement among the various circuit courts of appeal on the same important matter. U.S. Supreme Court Rule 10. Below is a summary demonstrating by the primary cases

concerning identification instructions that there is no uniformity among the circuits on this important matter. An issue of this magnitude needs the certainty of a ruling by this Court to bring uniformity in the approach to this constitutional question and to assure fair and just application of the procedures at trial concerning identification instructions to all defendants ensuring them fair trials, process that is due and equality under the law.

To preface the analysis below, Higgs argues that a *Telfaire*-like instruction, or at a minimum, the instruction proffered by Higgs, must be given in every case in which there is one eye witness and little, if no, corroborating evidence of identification, and little other evidence, if any, of the crime with which a defendant is charged. Colorado's pattern general credibility instruction, as was relied upon in conjunction with the pattern elements of the offense instruction in the case on Petition, were not constitutionally sufficient to protect Higgs's XIV Amendment due process and VI Amendment fair trial rights. Thus, reversal of his conviction is required.

Reviewing the pertinent federal appellate circuits, the cases fall into four main categories with virtually no consistency of application:

A. SPECIFIC IDENTITY INSTRUCTION MUST BE GIVEN

D.C. Circuit - *U.S. v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972), set the benchmark for a more definite and constitutionally protective identification instruction, but mandated the instruction based on a totality of the circumstances of each case test. However, the *Telfaire* court did indicate that such an instruction is imperative.

7th Circuit - *U.S. v. Hodges,* 515 F.2d 650 (7th Cir. 1975), indicates that a specific instruction must be given when identification is the only issue; there is only one witness on the issue of identification; and that failure to give the instruction cannot be cured by arguments of counsel or cross-examination. See also, *U.S. v. Anderson,* 739 F.2d 1254 (7th Cir. 1984), citing *Hodges.*

DC Circuit - *Salley v. U.S.,* 353 F.2d 897 (D.C. Cir. 1965), generally follows *Telfaire,* but again emphasizes the importance of the identification and that there is substantial likelihood of mistake in identification cases.

4th Circuit - *U.S. v. Holley,* 502 F.2d 273 (4th Cir. 1974), directed the courts to adopt the *Telfaire* instruction in cases involving a single witness as to the issue of identification.

B. NO IDENTIFICATION INSTRUCTION NEEDED WHEN GENERAL CREDIBILITY INSTRUCTION IS GIVEN

11th Circuit - *U.S. v. Martinez,* 763 F.2d 1297 (11th Cir. 1985), stands for the rule that if there is a general credibility instruction given, then no specific instruction on identification is needed. This same stance is taken in *Jones v. U.S.,* 361 F.2d 537 (D.C. Cir. 1965) of the D.C. Circuit (which is directly contrary to *Telfaire* in the same Circuit), and *U.S. v. Wilford,* 493 F.2d 730 (3rd Cir. 1974), in the 3rd Circuit.

Colorado Court of Appeals– *People v. Thiery,* 780 P.2d 8 (Colo. App. 1989), mandates that if there is a positive identification, other evidence of the defendant's guilt; and the general credibility instruction given, then no *Telfaire* – like instruction is required. The situation in *Thiery* also included the point that, unlike in the case on Petition, the jury instruction

tendered by the defense was neither a correct statement of the law, nor of the facts.

C. POSITIVE IDENTIFICATION REQUIRES NO SPECIFIC IDENTIFICATION INSTRUCTION

2nd Circuit - *U.S. v. Evans,* 484 F.2d 1178 (2nd Cir. 1973), determined that if there was a positive identification, then no specific identification instruction is needed and the standard for review is whether the trial court abused its discretion.

9th Circuit - The *U.S. v. Masterson,* 529 F.2d 30 (9th Cir. 1976), case lines up for the same principles as those summarized from *Evans* above.

10th Circuit - *U.S. v. McGuire,* 200 F.3d 668 (10th Cir. 1999), follows the reasoning of both *Evans* and *Masterson,* but pays special attention to the identification witness' ability to observe the alleged perpetrator, and requires a case by case analysis using the standard of abuse of discretion by the trial court.

D. OTHER POSITIONS BY OTHER COURTS

8th Circuit - *U.S. v. Dodge,* 538 F.2d 770 (8th Cir. 1976), involved a positive identification, which did not require reversal of the conviction, but the court remained "deeply concerned" about the issue of possible misidentification.

6th Circuit - *U.S. v. Jackson,* 347 F.3d 598 (6th Cir. 2003), articulated a three prong test for determining whether the failure to give a specific identification instruction was reversible error. All three prongs must be present to require a specific instruction on identification. *Jackson* wrote in

pertinent part: " A district court's refusal to deliver a requested jury instruction [is] reversible error only if the instruction (1) is not a correct statement of the law; (2) was not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *Id* at 606. This test is different than the case by case, abuse of discretion standard in place in the 2nd, 9th and 10th Circuits.

D.C. Circuit - *U.S. v. Barber,* 442 F.2d 517 (3rd Cir. 1971), provides yet another approach to the same issue by issuing a four part test to see if a specific identification jury instruction should be issued. (*See, Barber, supra.)* If any one of the four parts is missing, then a specific identification instruction is required.

Other State Courts - For, example, the Missouri appellate court in *Missouri v. Todd,* 537 S.W. 2d 865 (1976), has ruled that no specific identification instruction is needed if the issue is fairly included in the other instructions, whatever that nebulous standard means.

CONCLUSION

With the various circuits and state courts enunciating widely differing standards affecting a basic, but highly important constitutional right, and in particular to the case on Petition, where there is a single witness on the issue of identification, little or no evidence of the defendant's commission of the alleged crime, and the refusal by the court to submit a specific identification instruction that is not only a correct statement of the law, but which also goes to the stipulated single issue, the heart and soul of the prosecution of Defendant, this Court is urged by Petitioner to accept his appeal for review. Petitioner's liberty is at stake and it should not be jeopardized by an error so fundamental, such as the one that occurred in this case.

Dated: November 15, 2004

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